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No. 87-.....

In The
Supreme Court of the United States
October Term, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,

Petitioners,

v.

UNITED STATES OF AMERICA, AND MBANK ABILENE, N.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Fifth Circuit's decision that 12 U.S.C. § 91 prohibits collection of a judgment against a national banking association during an appeal from the judgment contrary to this Court's holding in *Third National Bank v. Impac, Ltd., Inc.*, 432 U.S. 312 (1977) in that the Fifth Circuit's holding:

   (a) grants to national banks a privilege unavailable to other competing lenders; and,

   (b) is contrary to this Court's holding that "[F]airly read, the statute merely prevents prejudgment seizure of bank property by creditors of the bank"?

2. Is the Fifth Circuit's decision contrary to this Court's holding in *Pierson v. Ray*, 386 U.S. 457 (1967) because it construes 12 U.S.C. § 91 contrary to its ordinary meaning and in derogation of common law in the absence of any specific expression of Congress to that effect?

3. Is the entry of a preliminary injunction by a United States District Court to prohibit the issuance of post judgment process against a judgment debtor national banking association appropriate in view of the fact that the injunction permits the judgment debtor to dissipate its assets during the appeal of the state court judgment by paying all creditors other than the judgment creditors?

4. Does a United States District Court have subject matter jurisdiction to enjoin the issuance of process to collect a state court judgment against a national banking association pending the appeal of the state court judgment?

PARTIES TO THIS PROCEEDING

In addition to those parties named in the caption, the following are also parties to this proceeding:

Hilmar Zeissig, Defendant/Appellant

Bert Scales, Defendant/Appellant

Dieter Scherfenberg, Defendant/Appellant

Federal Deposit Insurance Corporation (Plaintiff/Appellee, represented by the United States of America)

Office of the Comptroller of Currency (Plaintiff/Appellee, represented by the United States of America)

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit, which is reported at 826 F.2d 387 and reprinted as Appendix A. The Fifth Circuit's order denying rehearing is unreported and

reprinted as Appendix B. The memorandum opinion and preliminary injunction of the United States District Court for the Northern District of Texas, Abilene Division (Belew, D.), are unreported and reprinted as Appendices C and D.

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JURISDICTION

The decision and judgment of the Court of Appeals were entered on September 9, 1987. A suggestion for rehearing *en banc* was denied on October 9, 1987, and the mandate issued on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1982).

———o———

STATUTE INVOLVED

12 U.S.C. § 91 (1982) reads as follows:

> Transfers by bank and other acts in contemplation of insolvency
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating

notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

STATEMENT OF THE CASE

A. Proceedings in the state court.

On August 12, 1986, the 240th District Court for Fort Bend County, Texas, entered a judgment in excess of $69 million against MBank Abilene, N.A., and in favor of Harry LeMaire, Richard Patton, Hilmar Zeissig, Bert Scales and Dieter Scherfenberg. The judgment was entered on a jury verdict, returned on June 19, 1986 after a five (5) week trial. The jury found that MBank Abilene had breached its contract with the plaintiffs, had defrauded the plaintiffs, had tortiously interfered with other contract rights of the plaintiffs, had violated the Texas Deceptive Trade Practices Act and had libeled Messrs. Patton and LeMaire.

On the date the state court judgment was entered, MBank Abilene presented an order, *ex parte,* to the state trial court judge, which was entered by the trial court. The order stayed enforcement of the judgment pending exhaustion of all rights of appeal. When the state court plaintiffs learned of the entry of the *ex parte* order, they filed a motion to set aside the *ex parte* order and, on September 2, 1986, the trial court withdrew its previous order staying enforcement of the judgment.

On September 4, 1986, MBank Abilene filed a motion for leave to file a petition for writ of mandamus with the Texas Court of Appeals, asserting that 12 U.S.C. § 91 (1982) prevented execution on the state court judgment prior to the exhaustion of all appeals. The Texas Court of Appeals denied the application on September 5, 1986. On or about September 6, 1986, MBank Abilene filed substantially the same motion with the Texas Supreme Court. The Texas Supreme Court denied the motion on September 8, 1986. MBank did not seek review of the decision of the Texas Supreme Court by this Court.

In a post judgment deposition taken on September 16, 1986, the appellants were informed of the following:

a. On August 15, 1986, just three days after the entry of the state court judgment, the bank transferred to a wholly-owned subsidiary of the bank, Anbore, Inc., all real estate owned by it as a result of foreclosure actions, the value of which was estimated at fifteen million dollars. The transfer permitted the bank to avoid the effect of a judgment lien with respect to some of the real estate.

b. On September 9, 1986, the bank pledged approximately twenty million dollars of assets to secure a one million dollar debt owed to the Federal Reserve Bank of Dallas.

c. On September 9, 1986, MBank Abilene pledged its remaining assets, worth in excess of two hundred million dollars, to secure a twenty-five million dollar line of credit with MBank Dallas, N.A., only one million dollars of which was advanced.

d. On September 9, 1986, MBank Abilene withdrew substantially all of its funds from correspondent accounts

it had maintained in its ordinary course of business and deposited those funds with MBank Dallas, N.A.

e. Although the pledge of assets to the Federal Reserve Bank in Dallas and MBank Dallas, N.A., was ostensibly to secure lines of credit for liquidity purposes, MBank Abilene had previously obtained credit on an unsecured basis for liquidity purposes in excess of forty-five million dollars without even so much as executing a note to evidence the debt.

On September 18, 1986, immediately upon the overruling of the bank's motion for new trial, the state court plaintiffs obtained the issuance of writs of garnishment against the Federal Reserve Bank of Dallas, MBank Dallas, N.A., MBank Fort Worth, N.A. and Anbore, Inc.

B. Proceedings in the United States District Court.

On September 22, 1986, the United States filed a complaint in the United States District Court for the Northern District of Texas seeking to enjoin petitioners from collecting their state court judgment against MBank Abilene. MBank Abilene had failed to post a supersedeas bond as required by Texas law to secure payment of the judgment pending the state court appeal.

MBank Abilene, N.A., reported to the district court that it was suffering operating losses in excess of $1.6 million per month and that it had less than twelve million dollars in equity. The uncontroverted evidence at the preliminary injunction hearing was that the appeal by the bank from the state court judgment will not have run its course earlier than June, 1988. It now appears the state appellate process may run well into 1989.

The Federal Deposit Insurance Corporation ("FDIC") held a fifty million dollar certificate of deposit from MBank Abilene which matured and was paid on August 6, 1987. Withdrawals by other depositors since the entry of the judgment have caused the bank's assets to decrease by more than thirty percent. Taking the state court plaintiffs' judgment into account, the bank's liabilities exceed its assets by at least $60 million.

The preliminary injunction was granted on October 24, 1986, on the ground that 12 U.S.C. § 91 (1982) prohibits any collection efforts by judgment creditors against national banks pending an appeal by the national bank judgment debtor. An expedited appeal was taken to the United States Court of Appeals for the Fifth Circuit by Harry LeMaire and Nan Patton, Independent Executrix of the Estate of Richard E. Patton, Deceased, from the preliminary injunction granted by the district court enjoining petitioners from attempting to collect the sixty-nine million dollar state court judgment obtained against MBank Abilene, N.A., during the pendency of MBank Abilene's state court appeal, despite the bank's failure to post a supersedeas bond to secure payment of the judgment.

While the events which precipitated the action by the government were the filing of the writs of garnishment, the preliminary injunction has a far greater effect than merely to enjoin further garnishment by the state court plaintiffs. The effect of the preliminary injunction is to relieve MBank Abilene from posting a supersedeas bond during the entire pendency of its appeal from the state court judgment despite undisputed evidence of continuing and severe deterioration of the financial condition of the

bank and the bank's obvious efforts to remove its assets from the reach of execution.

The preliminary injunction permitted the FDIC to receive a fifty million dollar preferential payment to the detriment of these petitioners and has permitted other preferential payments to all creditors of the bank other than these petitioners during the state court appeal.

C. Proceedings in the Court of Appeals.

On expedited appeal, the Court of Appeals affirmed the trial court's ruling on September 9, 1987, and denied petitioners' suggestion for rehearing *en banc* on October 9, 1987. The Fifth Circuit, in reaching its decision, did not address the limitation placed in 12 U.S.C. § 91 (1982) by this Court in *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 554 (1977), that the statute merely prohibits *prejudgment* seizure of a bank's assets by its creditors. Neither did the Fifth Circuit address the rule of statutory construction announced by this Court in *Pierson v. Ray*, 386 U.S. 457 (1968). Indeed, its opinion cannot be reconciled with that decision because, although the Fifth Circuit has construed the statute in derogation of common law, neither any statutory language nor legislative history justified the result reached by the Fifth Circuit.

ARGUMENT

I.

THIS CASE OF FIRST IMPRESSION IS OF NATIONAL IMPORTANCE.

The decision by the Fifth Circuit in the case below is a case of first impression. Petitioners' $69 million judgment is the largest judgment ever granted against a national bank. The Fifth Circuit held that 12 U.S.C. § 91 (1982) prohibits execution upon the assets of a national banking association during the appeal of a judgment entered against it by a trial court. In effect a national bank now has a right not available to any person or entity other than the sovereign: to take an appeal from the entry of a trial court judgment without posting security for payment of the judgment during the appeal.

Whether a national bank must post a supersedeas bond to prevent execution during appeal is a question of national importance in view of developing state law permitting recoveries against lenders. The Independent Bankers Association of Texas and the Texas Association of Bank Holding Companies sought leave to file briefs as *amicus curiae* with the Fifth Circuit. No doubt, if the Court grants this petition for *certiorari,* many institutions and trade associations may seek leave to appear as *amicus curiae.*

The Supreme Court has construed 12 U.S.C. § 91 (1982) four times previously, most recently in *Third Nat'l Bank v. Impac Ltd., Inc.,* 432 U.S. 554 (1977). While this Court has clearly held that Section 91 prohibits prejudgment process against a national bank, it has also stated that Section 91 is of limited scope and only prevents prejudgment process.

This case involves weighing the significant interests of creditors who have secured a judgment against a national bank after a plenary trial against the interests of other creditors of the bank, including the FDIC, during the appellate process. The Fifth Circuit's decision arms a national bank with the ability to distribute its assets selectively to its friendly creditors to the detriment of creditors hostile to the bank. By allowing a bank to prefer payment of some creditors over others, the Fifth Circuit's decision frustrates the very purpose of Section 91, which is to secure fair and equitable payment to all the creditors of a national bank.

II.

THE FIFTH CIRCUIT FAILED TO FOLLOW THE MANDATE OF THE SUPREME COURT IN THIRD NAT'L BANK V. IMPAC LTD., INC., 432 U.S. 312 (1977), IN THAT THE COURT'S READING GIVES AN UNJUSTIFIED PRIVILEGE TO BANKS WHICH IS UNAVAILABLE TO COMPETING LENDERS; THAT IS, THE ABILITY TO APPEAL THE ENTRY OF A JUDGMENT WITHOUT POSTING SECURITY.

The Supreme Court, in *Third Nat'l Bank v. Impac Ltd., Inc.*, refused to construe Section 91 so as to prevent the entry of a preliminary injunction against a bank to enjoin a bank from foreclosing upon a debtor's property. One of the reasons given was that such a reading would:

> give national banks engaged in the business of making mortgage loans secured by mortgages on real estate a privilege unavailable to competing lenders.

Id. at 323. The Court stated:

We cannot believe that Congress intended to give national banks a license to inflict irreparable injury on

> others, free from the normal constraints of equitable relief.

Id.

The Fifth Circuit's decision has given national banks a license to inflict injury on its hostile, but rightful, creditors free from ordinary restraints imposed on others to post security to pay judgments during appeal. The Fifth Circuit has accorded to national banks a status previously reserved for the sovereign only.

There is no justification for granting to national banks the privilege of appealing judgments entered against them without posting security while other lending institutions are not accorded the same privilege. The state court judgment entered against the bank is supported by a jury verdict finding that the bank committed fraud, deceptive trade practices, breached its contract, and libeled the plaintiffs. No defendant other than the sovereign is entitled to take an appeal from a judgment finding it to have committed such egregious acts without securing the judgment creditor against dissipation of its assets during the appeal.

No privilege such as that purportedly conferred upon national banks by the Fifth Circuit should be conferred upon an institution without a concomitant obligation being imposed on the beneficiary of the privilege. The sovereign is understandably free from the requirement to post security pending appeal. The sovereign is presumed to have sufficient funds to pay its debts and is presumed to act in the best interests of the electorate. National banks are established for the private gain of their shareholders, have no responsibility to the public at large and have no obligation

to act in the best interests of the electorate or their creditors.

Many other institutions compete with national banks and are not accorded the same privilege. State banks, thrift institutions, savings and loans institutions chartered under state and federal law, credit unions, insurance companies, and pension funds, to name only a few, compete with national banks. All are, in one manner or another, repositories of funds entrusted to them by members of the general public and each of them can be denominated a "quasi public institution". Moreover, the purposes for which many of them are instituted are national in character. Yet, the court's opinion grants only to national banks a right deprived of all other such competing institutions, that of the right to act with impunity until the exhaustion of all appellate processes available to them after a judgment has been entered against them. As the Supreme Court stated in *Third Nat'l Bank v. Impac Ltd., Inc.*: "[N]o reason has been advanced for assuming that Congress intended such disparate treatment." *Id.* at 323.

III.

THE FIFTH CIRCUIT'S OPINION IS CLEARLY CONTRARY TO THE INTERPRETATION OF SECTION 91 BY THE SUPREME COURT IN THIRD NAT'L BANK V. IMPAC LTD., INC., WHICH STATED: "[F]airly read, the statute merely prevents prejudgment seizure of bank property by creditors of the bank." Id. at 324.

The most recent interpretation by this Court is *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312 (1977). In that case this Court plainly stated:

> [F]airly read, the statute merely prevents *prejudgment* seizure of bank property by creditors of the bank.

Id. at 324. (Emphasis added.) The introduction to the opinion states:

> A federal statute enacted in 1873 provides that certain *prejudgment writs* shall not be issued against national banks by state courts.

Id. at 312-13. (Emphasis added.) This Court consistently referred to Section 91 as a statute which applies "before judgment" *Id.* at 315; or as applying to "*prejudgment* seizure of bank assets," and as a "prohibition against *prejudgment* orders protecting the assets of third parties, including debtors of the bank." *Id.* (Emphasis added.) Mr. Justice Stevens on behalf of the majority further stated that the original 1864 National Currency Act "did not, however, include the prohibition against the issuance of *prejudgment writs* now found in 12 U.S.C. § 91." *Id.* at 317. (Emphasis added.) Also, in describing the 1873 amendent this Court stated: "[T]he prohibition against *prejudgment writs* was combined with the provision concerning preferential transfers and acts in which contemplation of insolvency to form Section 5242, which is now 12 U.S.C. 91." *Id.* (Emphasis added.)

This Court further stated, "[F]or the past century the prohibition against *prejudgment writs* has remained in the preferential transfer section." *Id.* at 318. (Emphasis added.)

In footnote 6 of its opinion this Court noted that the prohibition against prejudgment seizure of a bank's assets was prompted by state *prejudgment* attachment statutes. Under state law national banks were, by definition, foreign

corporations, whose assets were subject to attachment and even execution at the commencement of suit.[1]

The context in which the term "injunction" was used was crucial to this Court. This Court held that because attachment and execution were means to seize a bank's property, the term "injunction" applied only to efforts to interfere with a bank's property. This Court therefore held that Section 91 did not prohibit prejudgment injunctions to prevent the seizure of a debtor's property by a bank.

Just as the words "attachment", "injunction", and "execution" must be given related meaning, so should the words "State [court]", "county [court]", and "municipal court" be given related meaning. County and municipal courts are trial courts. A "final judgment" is entered in a "suit, action or proceeding" in a "municipal" or "county court" *by* the municipal or county court in the suit. To give "State [court]" a related meaning, one must construe the statute to mean "State trial court".

Even authorities cited by the Fifth Circuit indicate that Section 91 prohibits only prejudgment seizure. The Fifth Circuit contorted the holding of *The Planter's Loan and Savings Bank v. Berry*, 91 Ga. 264, 265 (1872) which

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[1] In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court for the first time required that defendants be accorded a hearing prior to the seizure of their assets. In 1873, the states' statutory prejudgment asset seizure laws permitted attachment and execution on a defendant's property and even the incarceration of the defendant at the commencement of an action prior to a hearing of any kind. See notes 3-14 *infra*. Summary collection procedures to seize a defendant's person or property were available to a plaintiff merely upon the filing of an affidavit. It is against this backdrop of summary collection procedures that the prohibition against prejudgment writs was enacted in 1873.

was footnoted and quoted by this Court in *Third Nat'l Bank*. The Fifth Circuit stated that *Planter's* held that Section 91 was designed to prevent execution before "final adjudication of claims," 826 F.2d at 390. However, *Planter's* merely stated,

> Antejudgment seizures cannot be made; a state can make post-judgment seizures only. Mesne process will not suffice. . . .

91 Ga. at 265. Execution on a final judgment entered by a trial court is not mesne process.

Finally, this Court's review of its prior decisions construing Section 91 removes all doubt about the meaning of "final judgment." In *Third National Bank* this Court quoted from its decision in *Van Reed v. People's Nat'l Bank*, 198 U.S. 554 (1904) wherein this Court held:

> [S]ince the rendition of that decision [*Mixter*], it has generally been followed as an authoritative construction of the statute holding that no attachment can issue from a state court *before judgment* against a national bank or its property.

Id. at 319. (Emphasis added.) This Court also construed its prior decision in *Earle v. Pennsylvania*, 178 U.S. 449 (1900) as demonstrating that

> "under any circumstances" language in *Mixter* had reference to the financial condition of the bank, rather than to any possible cases in which a *prejudgment writ* issues against a national bank.

Third National Bank at 320.

The Court quoted the first Mr. Justice Harlan in *Earle* as having stated that "the ban on *prejudgment writs*

must be construed in connection with the previous parts of the same section", concerning preferential transfers. *Id.* at 320. (Emphasis added.)

> In its own analysis of the statute, this Court stated:
>
> It appears likely that when originally passed the provision barring *prejudgment writs* actually was aimed at preventing preferences by creditors.

Id. at 324. (Emphasis added.) Finally the Court rendered its opinion that "fairly read, the statute merely prevents *prejudgment* seizure of bank property by creditors of the bank." *Id.* (Emphasis added.)

In the 114 years since the enactment of the clause under consideration, it has never been construed by any court to prevent execution upon a judgment entered by a trial court which is final for purposes of appeal. When a statute has been in force for many years and has been before the courts on numerous occasions, the lack of any precedent supporting the particular construction of that statute is itself significant evidence that the newly asserted construction is incorrect. *Massachusetts v. Mellon,* 262 U.S. 447, 487 (1923).

Despite the Fifth Circuit's efforts to conjure a different and more expansive purpose to the 1873 Act, all that can be said relating to the purpose of the Act is that it was intended to eliminate the legal fiction that national banks were foreign corporations under state laws and to insure that a national bank had the benefit of a trial before its assets were seized.

IV.

THE FIFTH CIRCUIT HAS CONSTRUED SECTION 91 IN DEROGATION OF COMMON LAW CONTRARY TO THIS COURT'S DECISION IN PIERSON v. RAY, 386 U.S. 567 (1968).

In *Pierson v. Ray,* 386 U.S. 547 (1968), this Court held that congress will not be presumed to have abrogated a long standing doctrine of common law unless its intent is specific and readily discernible from the act itself or from its legislative history. In *Pierson,* the question was whether 42 U.S.C. § 1983 (1982) ("Section 1983") abolished the doctrine of judicial immunity. The statute by its plain terms imposed civil liability for damages upon all state officials, including judges. The legislative history was silent on whether Section 1983 was intended to abolish the immunity which the common law had long granted to trial court judges. This Court held that the doctrine of judicial immunity was so ingrained in the common law at the time of the enactment of Section 1983 that "Congress would [have] specifically so provide[d] had it wished to abolish the doctrine [of judicial immunity]." *Id.* at 554-55.

The appellate review of civil actions and the posting of supersedeas bonds during appeals have their roots in ancient common law. For more than 100 years prior to the American revolution, the law in England required a person to post a supersedeas to avoid payment of a trial court judgment during appeal. *Omaha Hotel Co. v. Kountze,* 107 U.S. 377 (1882). The same concept has been adopted by the federal and state governments and is a basic tenet of the common law of England, the law of the United States

and the law of the State of Texas. *Id., see also,* Fed.R.Civ. P. 62; Tex.R.Civ.P. 364-368.

Under very early English law, a writ of error suspended collection of a judgment; no security was required to suspend execution during an appeal. English statutes were amended beginning in the sixteenth century when abuses of the writ of error process became evident *Omaha Hotel Co.* at 382-3. The requirement that a bond be posted to supercede execution during appeal reflects an ancient policy determination that balances two competing interests—the judgment debtor's right to the presumption that the judgment is correct coupled with his right to security for payment if he is not to be paid immediately, versus the possibility of trial court error and reversal of the judgment. *See, Omaha Hotel Co. v. Kountze,* 107 U.S. 377 (1882).

A supersedeas bond protects the plaintiff from any deterioration in the judgment debtor's ability to satisfy the debt during the appeal and from the debtor's natural tendencies to transfer his assets beyond the judgment creditor's reach during the appeal. Likewise, the judgment debtor is relieved of the risk that the judgment creditor will be unable to repay the judgment amount in the event the trial court judgment is reversed.

Had Congress intended to grant national banks an exemption from posting security to prevent execution during the appellate process, Congress had the ability to do so. However, its intent would have been clearly evident from the language of the statute. Congress has granted such

exemptions to other institutions, but when it has done so, Congress has spoken in clear unequivocal language. As an example, 28 U.S.C. § 2408 (1982), which exempts the United States and its instrumentalities from posting supersedeas bonds, provides:

> Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.

The Federal Rules of Civil Procedure are likewise very explicit and provide only one exception to the requirement of posting a supersedeas bond:

> When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

Fed.R.Civ.P. 62(e).

National banks are not the beneficiaries of either of these very specific provisions. Further, there is no reason to believe that Congress intended a national bank, a privately owned business, to share the same status as the sovereign.

Section 91 was passed by Congress without any legislative history, debate or even support from the administration. *Third Nat'l Bank v. Impac, Ltd., Inc.*, 432 U.S. 312, 323 (1977). The statute contains no language evidencing a specific intent by Congress to exempt national banks from posting supersedeas bonds to stay execution pending

appeal. Following the reasoning of *Pierson v. Ray*, because the necessity for a judgment debtor to post a supersedeas bond was long ingrained in the common law at the time of the enactment of Section 91, it must be assumed that Congress would have specifically abolished the necessity of posting a supersedeas bond if it had intended to do so.

The government has argued that the prohibition against execution in Section 91 demonstrates that Congress intended to change the common law. However, execution before judgment was available under state statutes in 1873. Prejudgment execution was available in the District of Columbia in 1873. Section VII, Act of October, 1778, Laws of the District of Columbia (1868) at 416. In addition, the laws of some of the states in force in 1873, *e.g.* Kentucky[2], Minnesota[3], Massachusetts[4], Arkansas[5], Iowa[6], New York[7], New Jersey[8], and Ohio[9], and the territories of Washington[10] and New Mexico[11] on their face appear to permit execution before entry of a final judgment by a trial court.[12]

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[2] Ky. Prac. Code, § 207 (1867).

"Sec. 207. Plaintiff may claim immediate delivery. The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the action, or at *anytime before judgment*, claim the immediate delivery of the property, as herein provided." (Emphasis added.)

[3] Minn. Rev. Stat., § 2 (1871).

"Sec. 2. The justice shall annex his certificate to it, record it and deliver it to the creditor; and if the debt is not paid at the time appointed, the creditor may deliver the recognizance to the clerk of the court of the county where taken, who shall record it in a book kept for that purpose, and place it on the files of the court; and at any time within three years after the debt be-

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Given the ability of a party to obtain prejudgment execution in 1873, Congress understandably specifically prohibited prejudgment execution.

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comes due, without any order of court, *he may issue an execution thereon,* including all interest due by the terms of the recognizance, varying the form of the execution accordingly, to be renewed by the clerk, served, and executed by all proper officers, as any other execution." (Emphasis added.)

[4] Mass. Gen. Stat. Ch. 152, § 5 (1861).

"Sec. 5. If the debt is not paid at the time appointed in the recognizance, the conusee shall be entitled to an execution for the sum due, to be sued out of the clerk's office in which the recognizance is recorded, and to be directed, served, and returned, in like manner *as an execution issued upon a judgment of the same court.*" (Emphasis added.)

[5] Ark. Laws, § 2666 (1874).

"Sec. 2666. All such bonds shall have the force and effect of a judgment, *and on which an execution may issue* which execution shall be indorsed that no surety of any kind is to be taken." (Emphasis added.)

[6] Iowa Prac. Code, § 3026 (1860).

"Sec. 3026. Judgments *or orders* requiring the payment of money, or the delivery of the possession of property are to be enforced *by execution.* Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempts." (Note the lack of a requirement that the order be final versus interlocutory.) (Emphasis added.)

[7] N.Y. Rev. Stat. Art. Sixth § 97 (1875).

"§ 97. When a bill shall be filed for the satisfaction of a mortgage, the court shall not only have power to decree and compel the delivery of the possession of the mortgaged premises to the purchaser thereof, but on the coming in of the report of sale, the court shall also have power to decree and direct the payment, by the mortgagor, of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law; and for that

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purpose *may issue the necessary executions,* as in other cases, against other property of the mortgagor, or against his person." (Note the lack of requirement for a final judgment.) (Emphasis added.)

[8] N.J. Rev. Stat. 976 (1846).

"1. Upon judgment obtained, *or to be obtained,* for debt, damages, and costs or other sum of money, in the supreme court, or in any circuit court or court of common pleas of this state, the party obtaining the same may have an execution against the body, or against the goods and chattels, lands, tenements, hereditaments, and real estate of the party against whom such judgment is or shall be awarded; but no execution shall be issued against the proper goods and chattels, lands, tenements, hereditaments, and real estate of any executor, administrator, heir or devisee, unless he or she shall have made his or her estate liable for the money so recovered by false pleading or otherwise." (Emphasis added.)

[9] Ohio Stat. Ann., § 5373 (1906).

"Sec. 5373. [Kinds of execution.] Executions are of three kinds:

1st. Against the property of the judgment debtor, including orders of sale.

2nd. Against the person of the judgment debtor.

3d. For the delivery of the possession of real property, including real property sold under orders of sale; the writ shall contain a specific description of the property, and a command to the sheriff to deliver the property to the person entitled thereto; the writ may also require him to make the damages recovered for withholding the possession, and cost or costs alone, out of the property of the person who so withholds the possession." (The third category requires no entry of a judgment prior to execution.)

[10] 1854 Wash. Laws, § 245 (Executions).

Sec. 245. There shall be four kinds of executions: one against the property of the judgment debtor; another against his person; the third for the delivery of the possession of real or personal property, or such delivery with damages, for withholding the same; and the fourth commanding the enforcement of or obedience to any special order of the court. And in all cases

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The Fifth Circuit has not referred to any previously undiscovered expression of intent on the part of Congress that Section 91 is to act as a writ of supersedeas or that Section 91 is intended to abolish the common law requirement of posting a supersedeas bond by a national bank. Without such an intent the statute cannot be presumed to have changed the common law. *Pierson v. Ray*, 386 U.S. 547 (1968).

V.

THE FIFTH CIRCUIT CONTORTED THE MEANING OF "FINAL JUDGMENT IN ANY SUIT. . . . IN ANY STATE, COUNTY OR MUNICIPAL COURT" BEYOND ITS ORDINARY MEANING.

The Fifth Circuit held that "final judgment" must be given a federal law meaning. However, under federal law,

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there shall be an order to collect the costs. (The third and fourth categories do not require the entry of judgment before execution.)

[11] N.M. Code Civ. P., Ch. XXXIV, § 1 (1865).

"Section 1. The party in whose favor any judgment, order or decree in any court may be returned, shall have execution therefor in conformity to the order, judgment, or decree." (No requirement that the judgment, order or decree be final.) In New Mexico a creditor could obtain a writ of capias which subjected the alleged debtor to arrest and incarceration at the commencement of an action. N.M. Code Civ. P., *Capais* Writs §§ 5-7.

[12] *Compare*, Tex. Civ. Stat., art. 1337 (1879).

"Art. 1337. Only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law."

Execution would issue only after the adjournment of the term of the court for cases in which final judgments had been entered during that term. Tex. Civ. Stat., art. 2267 (1879).

words in a statute are to be given their ordinary meaning. *United States v. 525 Co.*, 342 F.2d 759 (5th Cir. 1965); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962).

The ordinary and historical meaning of "final judgment" is a trial court judgment which determines the rights of all the parties and disposes of all the issues involved in the suit. This meaning had long been established in the common law by 1873, the date Section 91 was amended. *See e.g. Metcalf's Case*, 11 Coke 38, 77 Eng. Rep. 1193 (1615). That meaning was carried forward into American jurisprudence in the first judiciary act. Act of September 24, 1789, 1 Stat. 73, § 22.1.[13]

The Fifth Circuit has also taken the words "final judgment" out of the context of the statute. As has been stated above, the statute refers to final judgments in *suits, in* state trial courts. The petitioners are obviously the holders of a "final judgment" in a "suit" in a "State" court.

In justifying its interpretation of "final judgment", the Fifth Circuit cited instances where the term "final judgment" has been used in a manner other than its ordinary meaning. However, in the cases cited by the Fifth Circuit the courts' opinions have scrupulously and painstakingly justified an altered construction of the term.

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[13] The Act of June, 1872, Chapter 255 stated:

"Any final judgment or decree, in any civil suit or proceeding before a circuit court . . . may be reviewed and affirmed, reversed or modified by the Supreme Court, on writ of error or appeal. . . ." Section 693, Title XIII, Chapter II, 1873-74 Rev. Stat.

In *Russell v. National Mediation Board,* 764 F.2d 341 (5th Cir. 1985), *McDonald v. Schweiker,* 726 F.2d 311 (7th Cir. 1983), and *Schell v. Cochran,* 107 U.S. 624 (1883), the judgment debtor was the United States which is never required to post a supersedeas bond or pay a judgment until the appellate process is complete or abandoned by the government. Only the United States and its instrumentalities are accorded that privilege. The privilege has been conferred upon the sovereign by common law and by statute. 18 U.S.C. § 2408 (1982).

Construction of the term "final judgment" for purposes of *res judicata* or collateral estoppel as in 12 U.S.C. § 16(a) (1982) to mean a judgment after affirmance on appeal is consistent with, not contrary to, the common law. Generally, at common law a judgment could not be used as evidence or as a bar until all appeals had been exhausted. 2 Freeman on Judgments, § 722 (5th Ed. 1925). Cases construing 12 U.S.C. § 16(a) (1982) in consonance with common law are therefore not authority for construing 12 U.S.C. § 91 (1982) in derogation of common law.

Nor does the Fifth Circuit's opinion find support from *Clark v. Securities Industries Ass'n,* — U.S. —, 107 S. Ct. 750 (1987). In that case judicial precedent, industry usage and legislative history all supported this Court's construction of the term "branch" under the National Banking Act.

The Fifth Circuit's reliance on *Bradley v. Richmond School District,* 416 U.S. 696 (1974) is nothing less than farfetched. In *Bradley* this Court merely held that legislation authorizing recovery of attorneys' fees in school desegregation cases applied to an action on appeal when

the legislation became effective. This Court anchored its holding on the principle that "a court is to apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. Thus this Court held that the appellate court should have applied the law in force at the time of its decision. This Court's decision in *Bradley* simply has nothing to do with the construction of the term "final judgment" in Section 91.

VI.

THE PRELIMINARY INJUNCTION FRUSTRATES THE VERY PURPOSE OF SECTION 91 IN THAT IT ALLOWS CREDITORS OTHER THAN THESE PETITIONERS TO OBTAIN PREFERENTIAL PAYMENTS FROM THE BANK.

Ironically, 12 U.S.C. § 91 (1982), a statute designed as a shield to protect creditors from preferential payments made by a bank to selected creditors, has been used as a sword against these petitioners. The preliminary injunction permits all creditors other than these petitioners to be paid debts owed to them during the pendency of the state court appeal. The resulting preference of all other creditors over these petitioners is directly contrary to the purpose of Section 91 which was enacted to insure equality among creditors in the division of a bank's assets. *Pacific Nat'l Bank v. Mixter,* 124 U.S. 721, 727 (1888).

The appellants are now legitimate creditors of the bank. Judgments of a Texas trial court are presumed to be correct, regular and in compliance with the law. *Smith v. Texas Imp. Co.,* 570 S.W.2d 90 (Tex.Civ.App.—Dallas

1978, no writ); *Morin v. Morin*, 561 S.W.2d 263 (Tex.Civ. App.—Corpus Christi 1978, no writ); *T. J. Service Co. v. Major Energy Co., Inc.*, 552 S.W.2d 598 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.); *Dorfman v. Dorfman*, 457 S.W.2d 417 (Tex.Civ.App.—Texarkana 1970, no writ).

The events outlined in the statement of facts demonstrate that other creditors are currently being, and will be, preferred in payment over these creditors during the state court appeal.

The bank has argued that it is free to pay its depositors during the appeal from the state court judgment and has cited *McDonald v. Chemical National Bank*, 174 U.S. 610 (1899), *Rucker v. Kokrda*, 68 F.2d 73 (10th Cir. 1933) and *Nelson v. Lewis*, 73 F.2d 521 (2d Cir. 1934) for that principle. The holdings in those cases demonstrate that the preliminary injunction fails to preserve the status quo and permits the continuing diminution of the bank's assets during the appeal to Patton and LeMaire's obvious detriment.

Congress cannot have intended to prevent post judgment process to collect a judgment debt. To do so creates disparity in treatment between judgment creditors and other creditors of the bank and runs contrary to well-settled principles of common law recognized in *Omaha Hotel Co. v. Kountze*, 107 U.S. 377 (1882).

VII.

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO ENJOIN ENFORCEMENT OF A STATE COURT JUDGMENT.

The District Court acted as an appellate tribunal of a state court judgment contrary to the decisions of this Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Although MBank Abilene had the opportunity to petition for a writ of certiorari from the decision of the Texas Supreme Court denying its petition for a writ of mandamus to enjoin the collection of the judgment, it declined to do so.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), a losing state court litigant alleged in a federal lawsuit that a state court judgment violated its right to due process and equal protection, that it was the product of misapplied state law, and was entered by a biased state court. *Id.* at 415, 417. Affirming the district court's dismissal of the suit for want of jurisdiction, this Court declared: "If the constitutional questions stated in the [pleading] actually arose in the cause, it was the province and duty of the state courts to decide them." *Id.* at 415. If the state court decision was wrong, this Court continued, the remedy for constitutional error lay in "reversal or modification in an appropriate and timely appellate proceeding." *Id.* This Court explained that "no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character," for "[t]o do so would be an exercise of appellate jurisdiction" that district courts do not possess. *Id.* at 416.

This Court recently reaffirmed this principle in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). There plaintiff attorneys invoked Section 1983 to challenge decisions of the District of Columbia Court of Appeals denying them admission to the District bar. *Id.* at 470-73. The central issue for this Court —not present here—was whether the proceedings on the bar applications were "judicial in nature" so that review of the decisions by the district court would constitute an exercise of appellate powers over the equivalent of a state judicial determination. *Id.* at 476-79. Holding that the proceedings were "judicial in nature," this Court ruled that the district court lacked jurisdiction to review the orders denying admission. *Id.* at 486-87. This Court thus reaffirmed that a district court has no power to review a state judgment in the guise of adjudicating an ostensibly original claim under Section 1983. *Id.* According to this Court, "Review of [such judgments] may be had only in this Court." *Id.*

As was stated by MBank Abilene's counsel when appearing for Pennzoil before the Second Circuit in *Texaco v. Pennzoil:*

> A judgment that cannot legally be enforced is no judgment at all. By definition a judgment bestows rights on a party, rights "without which the judgment would have little or no value." *National Union Of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43 (1954). An order that denies the judgment creditor its rights in a judgment deprives the judgment of meaning, and does so as directly as an order vacating the judgment itself. To rule that a judgment entered by a trial court cannot be enforced is as much an exercise of appellate power as a declara-

tion that the judgment is void, reversed, vacated, or modified.[14]

By presuming that the judgment may not be affirmed, the Fifth Circuit has in effect reversed the state trial court judgment pending its affirmance on appeal. It has stripped Patton and LeMaire of their rights under the judgment and denied their present status as creditors of the bank.

CONCLUSION

The Fifth Circuit's construction of Section 91 in derogation of the common law is not justified by the legislative history of the act, is contrary to the express language of the statute and is contrary to this Court's decisions in *Pierson v. Ray,* and *Third National Bank v. Impac Limited, Inc.* The lower courts' construction of the term "final judgment" is contrary to its ordinary meaning and its usage by Congress. The lower courts have granted a privilege to national banks heretofore reserved only for the sovereign which is unjustified by any language in the statute. The result of the preliminary injunction is a drastic alteration of the status quo, is contrary to the very purpose for which the statute was enacted and has grievously injured these petitioners.

[14] Brief for Appellant Pennzoil Company, at 21, Cause No. 86-7046, 7052; In the United States Court of Appeals for the Second Circuit.

PRAYER

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1761

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARRY LEMAIRE and Estate of RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG,

Defendants-Appellants,

versus

MBANK ABILENE, N.A.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 9, 5 Cir., 1987, — F.2d —)

(October 9, 1987)

Before POLITZ, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(√) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX B

UNITED STATES of America,

Plaintiff-Appellee,

v.

Harry LEMAIRE, Estate of Richard Patton, Hilmar R. Zeissig, Bert F. Scales, and Dieter J. Scherfenberg, Defendants-Appellants,

v.

MBANK ABILENE, N.A.,

Defendant-Appellee.

No. 86-1761.

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1987.

The United States, on behalf of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, filed action, seeking injunction prohibiting execution of state court judgment against bank during pendency of the state court appeal. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., granted requested relief. Appeal was taken. The Court of Appeals, Politz, Circuit Judge, held that "final judgment," within meaning of statute proscribing attachment, injunction, or execution against any national bank before final judgment in any suit in state court, meant judgment on the merits which is no longer subject to examination on appeal.

Affirmed.

Banks and Banking 278, 279

"Final judgment," within meaning of statute which proscribes attachment, injunction, or execution against any national bank before final judgment in any suit in state court, means judgment on the merits which is no longer subject to examination on appeal; therefore, judgment against bank could not be executed during pendency of the state court appeal. National Bank Act, 12 U.S.C.A. § 91.

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

This appeal requires us to define the term "final judgment" as used in 12 U.S.C. § 91, which proscribes "attachment, injunction or execution" against a national bank "before final judgment in any suit" in state court. We agree with the trial court's interpretation and affirm.

Background

The genesis of the present proceeding is a state court suit by Harry Lemaire and the other appellants against MBank Abilene, formerly Abilene National Bank, alleging breach of contract, fraud, and tortious interference with

contract. At the conclusion of an extended trial the jury awarded appellants sixty-nine million dollars.

MBank appealed the adverse judgment to the Texas Court of Appeals, but did not post a supersedeas bond. The trial court first stayed enforcement of the judgment pending exhaustion of all rights of appeal, but then vacated that order. MBank petitioned the Court of Appeals and the Supreme Court of Texas for a writ of mandamus directing the trial court to give effect to 12 U.S.C. § 91 and thereby preclude execution of the judgment pending the appeal. When the state appellate courts declined to consider those petitions, appellants caused writs of garnishment to be served on, *inter alia*, the Federal Reserve Bank in Dallas, which stopped clearance of MBank checks and threatened its insolvency. In response to this development the United States, on behalf of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency,[1] filed the instant suit in federal district court, invoking 12 U.S.C. § 91 as the basis for a temporary restraining order and preliminary injunction prohibiting appellants from executing on the state court judgment during the pendency of the state court appeal. The district court granted the requested relief and this appeal followed.

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1. The interest of the United States stems from the fact that the FDIC holds a fifty-million-dollar certificate of deposit on MBank Abilene and is liable for over one hundred sixty-eight million dollars of insured MBank deposits. Further, the Comptroller of the Currency exercises extensive control over all activities, including dissolution, of national banks under the National Bank Act, 12 U.S.C. § 38 (codified as detailed in the "References in text" thereto).

Analysis

As noted, the sole issue posited by this appeal is the meaning of the term final judgment in 12 U.S.C. § 91, which prescribes in pertinent part that

> no attachment, injunction, or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellants insist that the garnishment they caused to issue was not inconsistent with this congressional mandate because the state trial court had entered a final judgment. The district court was not persuaded and concluded that final judgment within the intendment of 12 U.S.C. § 91 means a judgment from which no appeal can be taken. The district court found that the garnishment violated 12 U.S.C. § 91 and enjoined any action by appellants to enforce the state court judgment pending its review on appeal.[2]

The issue faced by the district court, and now by this court, is *res nova*. Although the Supreme Court has re-

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2. The Anti-Injunction Act, 28 U.S.C. § 2283, prohibiting a federal court from enjoining state court proceedings, is not applicable. The Act does not prevent the United States, or one of its agencies, from acting to protect a federal interest. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971). Moreover, the Act does not apply to injunctions "expressly authorized by Congress," including injunctions necessary to protect a right created by Congress. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

viewed the text of 12 U.S.C. § 91 on four occasions,[3] it has not considered the final judgment inquiry now presented. Nor has any federal appellate court.[4]

It is axiomatic that the meaning of final judgment varies according to context. Appellants urge that we simply accord the meaning ascribed when appealability itself is at issue, namely a judgment on the merits by the trial court. *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b). To do so would be overly facile and would oblige us to ignore those instances wherein the term has been recognized as meaning a judgment after all appeals have been exhausted. That is the definition given to it by this court and our colleagues in the Seventh Circuit in construing the Equal Access to Justice Act, 28 U.S.C. § 2412(d). *Russell v. National Mediation Board*, 764 F.2d 341 (5th Cir. 1985), *withdrawn on other grounds*, 775 F.2d 1284 (1985); *McDonald v. Schweiker*, 726 F.2d 311 (7th Cir.1983). The same definition has been accorded in the Suits in Admiralty Act, 46 U.S.C. §§ 741, 748, and the Clayton Act, 15 U.S.C. § 16(a); *see McDonald; Illinois v. Sperry Rand Corp.*, 237 F.Supp. 520 (N.D.Ill.1965).

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3. *See Pacific National Bank v. Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Earle v. Pennsylvania*, 178 U.S. 449, 20 S.Ct. 915, 44 L.Ed. 1146 (1900); *Van Reed v. People's National Bank*, 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); and *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 97 S.Ct. 2307, 53 L.Ed.2d 368 (1977).

4. We find only one state appellate decision, *Loew's Incorporated v. Superior Court of the State of California*, 301 P.2d 64 (Cal.Ct.App. 1956), which defined final judgment as a judgment "from which no appeal can be taken." *Id.* at 72. The opinion was later withdrawn from official publication by the California Supreme Court. No reason was given for this withdrawal.

In 1883, not long after the language we consider today was added to our statutory treasury,[5] final judgment in a statute governing the execution of judgments against a revenue officer was taken to mean a judgment after affirmance on appeal. 28 U.S.C. § 2006 (Act Mar. 3, 1863, c. 76, § 12, 12 Stat. 741 (later R.S. 989)); *Schell v. Cochran*, 107 U.S. (17 Otto) 625, 27 L.Ed. 543 (1883). Finally, we observe that in at least one instance not requiring statutory interpretation, the Supreme Cort has given the term the judgment-after-appeal connotation. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 n. 14, 94 S.Ct. 2006, 2016 n. 14, 40 L.Ed.2d 476 (1974) (discussing collateral attack of a final judgment for purposes of retroactive application of a statute).

Appellants urge us to adopt what it advances as the Texas definition of final judgment: a judgment on the merits by the trial court.[6] We decline their invitation, for although a Texas state court judgment is involved it is a federal statute that we interpret. We are convinced that Congress intended that a federal definition of final judgment be applied to the terms and conditions of the National Bank Act. We are buttressed in this conclusion by a recent decision of the Supreme Court implicitly holding that a federal definition is to be given to words used in the National Bank Act. *Clarke v. Securities Industry Ass'n*, — U.S. —, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) ("branch," 12

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5. Revised Statutes of 1873-74, Title LXII, Ch. 4 § 5242, Act Mar. 3, 1873, c. 269, § 2, 17 Stat. 603.

6. *But see Renger v. Jeffrey*, 143 Tex. 73, 182 S.W.2d 701, 702 (1944) (distinguishing "final judgment" from "judgment before it comes final and while an appeal is pending" for purposes of Texas Rules of Civil Procedure 364, 368, and 385).

U.S.C. § § 36, 81). We have explicitly so held. *Department of Banking v. Clarke,* 809 F.2d 266 (5th Cir.), *cert. denied,* — U.S. —, 107 S.Ct. 3240, 97 L.Ed. 2d 745 (1987) ("state bank," 12 U.S.C. § 36). *Cf. Interfirst Bank Abilene v. FDIC,* 777 F.2d 1092 (5th Cir.1985) (allowance of claims against insolvent national bank is a matter of federal law).

We draw our final guidance from an analysis of the purpose of the statutory language now found in the last portion of 12 U.S.C. § 91. Although the legislative history is scant, the discussion in the Supreme Court decisions involving the statute is instructive.

The National Currncy Act, now the National Bank Act, was enacted in 1864 to provide for the formation and regulation of national banks. The prohibition which is the critical language before us today was added in 1873, a year of financial panic and widespread bank closings. That language was added to the section of the National Bank Act relating to preferential transfers and to acts in contemplation of involvency.[7] In its first discussion of the

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7. 12 U.S.C. § 91 in its entirety reads:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments of decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

subject legislation in *Pacific National Bank v. Mixter*, 124 U.S. 721, 726, 8 S.Ct. 718, 720, 31 L.Ed. 567 (1888), the Supreme Court opined that what is now 12 U.S.C. § 91 "was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank." The court later added that the provision sought to "prevent such banks from creating preferences in contemplation of their failure." *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 55, 57 S.Ct. 81, 83, 81 L.Ed. 33 (1936).

Our reading of the statute, and the early discussions of it by the Supreme Court, lead us to conclude that the provision was added to the preferential transfer section of the National Bank Act to prevent creditors from obtaining preferential treatment by court action, including the securing of a judgment at the trial court level.

The decision in *Earle v. Pennsylvania*, 178 U.S. 449, 20 S.Ct. 915, 44 L.Ed. 1146 (1900), adds little to our quest for it dealt only with an attachment against the bank as holder of a thing of value for another. But in its next encounter, *Van Reed v. People's National Bank*, 198 U.S. 554, 557, 25 S.Ct. 775, 776, 49 L.Ed. 1161 (1904), the Court recognized that:

> National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character . . . and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit.

Finally, in its most recent consideration of § 91, the Court footnoted and quoted with approval from an early decision by the Supreme Court of Georgia to the effect that the policy behind the legislation was to prevent prefer-

ence or priority of claims against national banks by seizure under state authority before final adjudication of claims, and to protect the banks from the crippling effects of such seizures. *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n. 13, 97 S.Ct. 2307, 2313 n. 13, 53 L.Ed.2d 368 (1977) (*quoting Planters Loan & Sav. Bank v. Berry*, 91 Ga. 264, 265, 18 S.E. 137 (1893)).

Congress has entrusted the superintendence of national banks to the Comptroller of the Currency, 12 U.S.C. § 1 *et seq.* Amongst the Comptroller's duties is the obligation to assure the continued viability of national banks where possible, and the orderly and fair liquidation of any national bank which falls into insolvency. The Comptroller is to protect the interests of the United States, direct and indirect, general and specific, and is to secure an equitable distribution of bank assets to the creditors of a failed bank.

Quick and vigorous action to prevent the premature, and potentially fatal, seizure of assets of an operational bank, an eye cautiously cocked to the financial interest of the government as a creditor of any "embarrassed" institution and as guarantor of its depositors, and the securing of substantial assets essential to a fair and equitable dispersal to creditors of a failed bank, are all important functions of the Comptroller. All are in the national interest as addressed by the Congress. We are persuaded that Congress intended to and did arm the Comptroller with the lorica of an absolute proscription against the seizure of the property of a national bank before a judgment against that institution had completed the appellate process.

For the foregoing reasons, we conclude and hold that the term "final judgment" as used in 12 U.S.C. § 91 means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review.

The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	
	)	CIVIL ACTION
VS.	)	NO. 1-86-143-K
	)	
MBANK ABILENE, N.A., HARRY LEMAIRE, RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG	)	(Filed October 24, 1986)

MEMORANDUM OPINION

On August 12, 1986, a $69,000,000.00 judgment was entered against MBank Abilene in the state court case of *Harry LeMaire, et al. v. MBank Abilene, N.A.*, Judgment was entered in the favor of LeMaire, Patton, Zeissig, Scales and Scherfenberg. On that same day, the trial court entered an order granting MBank's Motion to stay enforcement of the $69,000,000.00 judgment pending exhaustion of all rights of appeal. On September 2, 1986, the trial court withdrew its order. MBank subsequently petitioned both the Texas Court of Appeals and the Texas Supreme Court seeking a writ of Mandamus directing the trial court to give effect to 12 U.S.C. § 91.[1] Both courts

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1. Section 91 of Title 12 of the United States Code reads in part: ". . . [N]o attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court."

refused to hear the petitions. On September 18, 1986 the trial court denied MBank's motion for a new trial. On that same day, plaintiffs LeMaire, Patton, Zeissig, Scales and Scherfenberg caused writs of garnishment to be issued and served on MBank Dallas, MBank Fort Worth, the Federal Reserve Bank of Dallas and Anbore, Inc., a subsidiary of Mbank Abilene.

On September 22, 1986 the United States of America filed a complaint with this Court seeking a temporary restraining order and a preliminary injunction against LeMaire, Patton, Zeissig, Scales and Scherfenberg's execution of the state court judgment and attachments or garnishments resulting in connection therewith. On that day, this Court entered a Temporary Restraining Order. The Temporary Restraining Order has twice been extended. On October 16, 1986, the Court heard oral arguments on the United States of America's Motion for Injunctive and Declaratory Relief. The Court makes the following findings:

I. JURISDICTION

This Court finds that it is properly exercising jurisdiction over this case. Under 28 U.S.C. § 1345, the district court has jurisdiction over all cases in which the United States of America is a plaintiff. This is such a case.

Defendants LeMaire, Patton, Zeissing, Scales and Scherfenberg have filed motions to dismiss, alleging *inter alia* that the Court lacks *in personam* jurisdiction over them. Before the Court may issue preliminary injunction against the Defendants, it must have both subject matter and personal jurisdiction over them. *Enterprise Intern. v. Corporation Estatal Petrolera,* 762 F.2d 464, 470 (1985). The

Court finds that it has *in personam* jurisdiction over these Defendants. Process was personally served upon these Defendants on September 29, 1986. On September 23, 1986, the Court received notice that Richard Patton, one of the defendants, had died. Nan Patton, his wife, has been substituted into the case.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg also allege that this Court lacks subject matter jurisdiction over the controversy. Defendants allege that the United States of America lacks standing to pursue this claim. Defendants' Motion to Dismiss, etc. at 2.

The United States Supreme Court has recognized that the United States has standing to prevent interference with its powers and functions. In *In re Debs*, 158 U.S. 564 (1895), the Court stated:

> Every government, entrusted . . . with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

Id. at 584.

Congress was given the power to establish national banks under the constitutional provision relating to borrowing and coining money. U.S.Const.Art. I, § 8, Cl. 2 and 5; *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). In 1864, the Congress passed the National Currency Act and thereby established a "complete system" for regulation

of national banks. *Dietrick v. Greaney,* 309 U.S. 190, 194 (1940). The National Bank Act was amended in 1873 to prohibit the attachment, injunction or execution against a national bank before final judgment in any state, county or municipal court. 12 U.S.C. § 91. This section is at the heart of this controversy and therefore, the United States of America has standing to represent the interests of the federal government in the proper implementation and enforcement of Section 91.

In addition to the United States of America's general interest in ensuring that federal laws are implemented, the United States of America has more particularized interests at stake by virtue of two federal instrumentalities. The National Currency Act established the Office of the Comptroller of the Currency (OCC) within the Department of Treasury. 12 U.S.C. § 1. The OCC's duties involve the regulation and supervision of national banks. 12 U.S.C. § 1. MBank Abilene, N.A. is a national banking association and as such falls within the purview of the OCC. Parties' Stipulations at 2. Therefore, the OCC has a particularized interest in this Court's construction of 12 U.S.C. § 91.

A second federal instrumentality having a stake in the outcome of this suit is the Federal Deposit Insurance Corporation (FDIC). The FDIC insures the accounts of qualified depositors up to $100,000.00 12 U.S.C. § 1821. MBank Abilene has approximately $168,800,000.00 of insured deposits at its bank. Stone Affidavit at 3. If MBank Abilene is rendered insolvent, the FDIC will be obligated to repay a substantial portion of this amount. Therefore, it is clear that the FDIC has a very substantial stake in the outcome of this case. Accordingly, this Court finds that the United States of America is a proper party to this ac-

tion. It has standing to seek injunctive and declaratory relief from this Court. U.S.C. § 91 precludes attachment of assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

II. VENUE

Defendants allege that venue is improper in this district and accordingly urge that this matter be dismissed. LeMaire-Patton's Motion to Dismiss, etc. at 3; Zeissig-Scales-Scherfenberg's Motion to Dismiss, etc. at 5. Under 28 U.S.C. § 1391(b), venue in this action is proper in the judicial district where all the defendants reside or in which the claim arose. All the Defendants do not reside in one district.[2] Therefore, for this court to have proper venue over this action, the claim must have arisen in the Northern District of Texas. In determining where a claim arose, the Court should consider "events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." *Lamont v. Haig,* 590 F.2d 1124, 1134 (D.C. Cir. 1978). Courts have upheld a plaintiff's choice of venue in a district where some injury to the plaintiff occurred or where the effects of the defendant's conduct was felt. *See Murphy v. Allen County Claims & Adjustments, Inc.,* 550

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2. Defendant MBank Abilene has its principal offices and place of business in Taylor County in the Northern District of Texas. Defendants LeMaire and Zeissig reside in Fort Bend County in the Southern District of Texas. Defendants Scales and Scherfenberg reside in Harris County in the Southern District of Texas. Defendant Nan Patton resides in Bexar County in the Western District of Texas. Plaintiff's Proposed Findings of Fact and Conclusions of Law at 2.

F.Supp. 128, 131 (S.D. Ohio 1982); *Sanchez v. Pingree,* 494 F.Supp. 68, 70 (S.D. Fla. 1980); *Sheffield v State of Texas,* 411 F.Supp. 709, 713 (N.D. Tex. 1976).

Plaintiff United States of America has filed an action for declaratory and injunctive relief in this district—the Northern District of Texas. The preceding state court action was held in the Southern District of Texas. However, this present suit concerns the effects of that state court action on Defendant MBank Abilene. MBank Abilene is a resident of the Northern District of Texas. If the writs of attachment and garnishment are upheld in this action, the effects of those actions upon the Bank, its creditors, its depositors and the public will be felt most directly in this district. Therefore, following the *Sheffield* decision, the suit can be brought in the Northern District of Texas because venue is proper here.

III. DECLARATORY JUDGMENT

The United States of America seeks a declaratory judgment "declaring that 12 U.S.C. § 91 precludes attachment of the assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies." Complaint for Declaratory and Injunctive Relief at 6.

In construing 12 U.S.C. § 91, this Court must begin with the statutory language itself. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979). The Court is required "to give effect, if possible, to every word Congress used." *Id.* at 339 (*citing United States v. Menasche,* 348 U.S. 528, 538-39 (1955)). In attempting to glean Congress' intent from the statute, the Court is required to consider the context,

the purposes of the law, the circumstances under which the words were used, as well as the words themselves. *District of Columbia v. Carter,* 409 U.S. 418, 420 (1973).

The portion of 12 U.S.C. § 91 which the United States of America alleges is applicable to this action reads:

> ". . . [N]o attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

This provision of 12 U.S.C. § 91 was enacted in 1873. (Revised Statutes of 1873-74, Title LXII, Ch. 4 § 5242). This provision was added to Section 5242 (§ 91) which had previously dealt only with preferential transfers.

To date, the United States Supreme Court has considered 12 U.S.C. § 91 only four times. In *Pacific National Bank v. Mixter,* 124 U.S. 721 (1887), the Court was faced with the question of "whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States." *Id.* at 724. The Court concluded that no attachment could issue against a national bank before judgment in a state or federal suit. *Id.* at 727.

The next time the Supreme Court studied 12 U.S.C. § 91 was in *Earle v. Pennsylvania,* 178 U.S. 449 (1900). In that case, the Court held that "an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section." *Id.* at 454. Because garnishment of a depositor's property, not the bank's property, was sought in the *Earle* case, it does not control the instant case.

In *Van Reed v. Peoples' National Bank,* 198 U.S. 554 (1905) the Court interpreted 12 U.S.C. § 91 for a third time. The Court affirmed the *Mixter* Court's interpretation of 12 U.S.C. §91 as applying "to all conditions of national banks, whether solvent or insolvent." *Id.* at 559.

In 1977, the Supreme Court agan consdiered the meaning of 12 U.S.C. § 91 in *Third National Bank v. Impac Limited, Inc.,* 432 U.S. 312 (1977). The question presented in that case was "whether that prohibition [of 12 U.S.C. 91] applies to a preliminary injunction restraining a national bank from holding a private foreclosure sale, pending adjudication of the mortgagor's claim that the loan is not in default." *Id.* at 313. The Court concluded that 12 U.S.C. § 91 did not apply to "an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure." *Id.* at 324. Rather, the Court interpreted 12 U.S.C. § 91 to prevent the "prejudgment seizure of bank property by creditors of the bank." *Id.*

In the instant case, the United States of America seeks a prohibitory injunction after a complete state court trial on the merits. None of the Supreme Court decisions discussed above address the precise question raised here, that is the meaning of the term "final judgment" as contained in 12 U.S.C. § 91. The United States of America contends that final judgment is one from which no further appeal can be taken. Defendants LeMaire, Patton, Scales, Zeissig and Scherfenberg contend that final judgment is one from which an appeal can be taken. To date, the Supreme Court has not defined "final judgment" in the context of 12 U.S.C. § 91. It is therefore this Court's responsibility to interpret the meaning of "final judgment" within the context of Section 91.

The Supreme Court has noted that Section 5242 (now 12 U.S.C. § 91) was deliberately placed at the end of the preferential transfer section of the Banking chapter. *Mixter* at 726; *Earle* at 453; *Impac* at 322-24. The *Mixter* court found Congress' intent to be to assure equality among general bank creditors in the division of bank assets upon insolvency. *Mixter* at 727. The Supreme Court's reading of 12 U.S.C. § 91 is bolstered by the fact that 1873, the year of the amendment, was the year of a financial crisis. The Court took judicial notice of this fact when it rendered its *Impac* decision. *Impac* at 317. It appears clear that Congres intended 12 U.S.C. § 91 to prohibit premature attachment of bank assets by one of its creditors.

It is clear that the Congressional intent behind 12 U.S.C. § 91 was to ensure equality among the creditors in the distribution of bank assets upon insolvency. A finding that "final judgment" means one from which no further appeal can be taken would promote the settled Congressional intent. If a creditor were permitted to attach bank assets before final and dispositive resolution of his state court claim, he would be effecting a preference. Preferential transfers of an insolvent bank are clearly prohibited by 12 U.S.C. § 91. Defendants' reading of 12 U.S.C. § 91 could cause havoc. Under the Defendants' interpretation of the sattute, a creditor would be entitled to attach banks assets after a trial court judgment has been rendered but while an appeal is pending. This procedure is problematic. If an appellate court subsequently overturns or modifies the original state court judgment, the bank might have little recourse in regaining its assets. Such a reading and application as Defendants could force a national bank into pre-

mature insolvency. If MBank Abilene is required to pay off its $69,000,000.00 judgment now, it could become insolvent. Stone deposition at 49; Herrmann deposition at 29, 58. A subsequent reversal or modification of that judgment by a Texas appellate court may be of little avail. The bank may already be insolvent and the bank's depositors and creditors will yield to a preference accorded to LeMaire, Patton, Zeissig, Scales and Scherfenberg. The prevention of such an inequitable distribution of the bank's assets was precisely the Congressional intent behind 12 U.S.C. § 91.

To date, there is only one case dealing with this precise issue—*Loews' Incorporated v. Superior Court of the State of California,* 301 P.2d 64 (Cal. 1956). In that case, the Court interpreted "final judgment" to mean a judgment "from which no appeal can be taken." *Id.* at 72. The California court relied on the generally accepted meaning of the word "execution" in making its decision. The court noted that "a writ of execution 'is part of the remedy to effectuate the action by the enforcement of the judgment.'" *Id.* (*citing United States v. Nourse,* 34 U.S. 8, 27 (1835)). Because an execution "gives the successful party the fruits of his judgment," the court reasoned that final judgments must mean those from which no appeal can be taken. *Id.* at 72.

This Court is persuaded that the *Loews* court's interpretation of "final judgment" in 12 U.S.C. § 91 is a correct one. Such an interpretation furthers the Congressional purpose in enacting 12 U.S.C. § 91—that of assuring ratable distribution of assets between all creditors of the now insolvent bank.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg contend that even if the *Loews* decision applies

here, MBank Abilene has waived the benefits of 12 U.S.C. § 91. In *Loews,* the California court recognized that a bank could waive its advantage under 12 U.S.C. § 91. *Loews* at 72. In that case, a national bank undertook a foreclosure as authorized by state statute. The California court found that the bank had selectively used the state statute. *Id.* The court accordingly held that the national bank had waived its advantage under 12 U.S.C. § 91. *Id.* Defendants here assert that MBank Abilene has waived the benefits of 12 U.S.C. § 91. The United States of America is the plaintiff in the instant case; it is seeking to enforce 12 U.S.C. § 91. The United States of America was *not* a party to the state court action and has not sought the protections of any state statute, as did the plaintiff in the *Loews* case. Its only involvement is in filing its complaint for declaratory and injunctive relief to commence suit in this Court. Therefore, the United States of America did not waive any of the benefits it derives under 12 U.S.C. § 91.

In conclusion, the Court finds that given the Congressional intent behind enactment of 12 U.S.C. § 91, the plain meaning of the words themselves and the context of the words "final judgment", the words "final judgment" must be interpreted to mean a judgment from which no appeal can be taken. Accordingly, this Court will grant Plaintiff's requested declaratory relief. This Court finds that 12 U.S.C. § 91 precludes attachment of assets of, or execution upon the state court judgment directed to, Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

IV. PRELIMINARY INJUNCTION

In order for a preliminary injunction to issue, the movant must prove four things:

> "(1) a substantial likelihood of success on the merits;
>
> (2) a substantial threat of irreparable injury if the injunction is not issued;
>
> (3) that the threatened injury to the movant outweighs any danger the injunction might cause to the opponent; and
>
> (4) that the injunction will not disserve the public interest."

Enterprise Intern. at 472 (*citing Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984)).

The United States of America must prove that it is substantially likely to succeed on the merits. For the United States of America to prevail, it must prove that 12 U.S.C. § 91 prohibits the execution of a judgment against a national bank until all state court appeals have been taken. The Court is convinced that such a reading of 12 U.S.C. § 91 is correct. For all the reasons set forth above, the Court finds that the United States of America would likely prevail.

Second, the United States of America must demonstrate that there is a substantial threat of irreparable injury if the injunction is not issued. Irreparable injury has been defined to mean "injury that cannot be undone through monetary remedies." *Enterprise Intern.* at 472 (*citing Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981)). If no injunction was issued, MBank Abilene would be required to pay off its $69,000,000.00

judgment immediatedly. The United States of America has introduced evidence that MBank Abilene lacks sufficient funds from which to pay the judgment. Herrmann deposition at 29. It is therefore probable that MBank Abilene may become insolvent. Stone deposition at 49; Herrmann deposition at 29, 53. If MBank Abilene becomes insolvent, the United States of America will suffer irreparable injury.

The Federal Deposit Insurance Company (FDIC) would suffer irreparable injury. By law, the FDIC is required to insure each depositor in a national bank such as MBank Abilene up to $100,000.00. 28 U.S.C. § 1821. MBank Abilene has approximately $168,800,000.00 of insured deposits at its bank which the FDIC would be obligated to repay upon insolvency. Stone Affidavit at 3; Stone deposition at 58. The FDIC also has a $50,000,000.00 Certificate of Deposit on file with MBank Abilene. Only $100,000.00 of that amount is insured so the FDIC would be unsecured for the remaining $49,900,000.00. If MBank Abilene is rendered insolvent, the FDIC will be the largest unsecured creditor of MBank Abilene with a total indebtedness of $218,700,000.00. Stone Affidavit at 3. It is clear that a premature execution of judgment and consequent bank insolvency will harm the MBank Abilene's depositors. It will also affect the community at large. Stone deposition at 48. The public will lose confidence in the national banking system. The FDIC will also lose "substantial unrecoverable administrative expenses in connection with an unwarranted liquidation." Stone Affidavit at 4. The FDIC's injury would be irreparable—its harm could not be undone through monetary remedies. In the event *Le-*

Maire, et al's state court judgment is overturned or modified, the large amount of money expended to pay off secured depositors might not be repaid to the FDIC. No amount of money could restore the public's confidence in MBank Abilene. Also, no amount of money could rebuild MBank Abilene into the viable financial institution it presently is. As a practical matter, it would be impossible to reconstitute and reopen the bank. The Court finds that the FDIC will be irreparably harmed if the injunction does not issue.

The Office of the Comptroller of the Currency (OCC) likewise will suffer an irreparable injury if the injunction does not issue. The OCC has the statutory responsibility to see that federal banking laws are given full effect. Herrmann Affidavit at 2. If 12 U.S.C. § 91 is not read to prohibit execution of judgment before all appeals of the state court judgment have been exhausted, then the OCC will have failed in its duties. If 12 U.S.C. § 91 is not given the above reading, creditor and depositor confidence in the national banking system will be eroded. Herrmann Affidavit at 2-3. This loss of confidence is especially troublesome today in the face of adverse economic conditions and troubled banks. Hermann Affidavit at 2-3. The OCC's inability "to effectively administer the federal banking statutes for the protection of MBank Abilene's creditors and depositors, as well as for the welfare of the general banking public" would constitute irreparable injury. Herrmann Affidavit at 3. No amount of money could restore the public's confidence in the federal banking system. The Court is satisfied that the OCC will suffer irreparable harm if the injunction is not issued.

Third, the United States of America must prove its threatened injury outweighs any danger the injunction might cause to the Defendants. If the injunction does not issue, the United States of America will be injured by the possible insolvency of one of its national banks and its resulting monetary liability to depositors. As recited above, if MBank Abilene is required to pay off Defendants' $69,000,000.00 judgment immediately, it may become insolvent. If no financial institution can be found to assume MBank Abilene's liabilities, the FDIC will be liable for approximately $218,700,000.00. Stone Affidavit at 3; Stone deposition at 58.

Defendants LeMaire, Patton, Zeissig, Scales and Scherfenberg contend that they are entitled to recover their $69,000,000.00 judgment now. They allege that after all appeals have been taken in the state court action, MBank Abilene will have no money left from which to pay their state court judgment. A balancing of the Defendants' potentional inability to collect their judgment with MBank Abilene's probable dissolution with enormous resulting hardship on the United States of America clearly weighs more heavily in the Government's favor. Therefore, the Court finds that the United States of America's threatened injury outweighs any potential dangers suffered by Defendants.

Fourth, the United States of America must prove that issuance of an injunction will not disserve the public interest. If the injunction is issued, MBank Abilene will probably continue its normal business operations, thus serving its depositors, creditors and the public at large. Stone deposition at 48. If the injunction is not issued, the

Defendants would immediately seek execution of their writs of garnishment on MBank Dallas, MBank Fort Worth, Federal Reserve Bank in Dallas and Anbore, Inc. Upon execution of these writs, MBank Abilene would probably become insolvent. Herrmann deposition at 29. Such insolvency would disserve the public. In the past three years, a large number of banks have become insolvent. Stone deposition at 29-30. Already this year 109 banks have failed. Stone deposition at 30. The insolvency and failure of MBank Abilene would cause the public to lose further confidence in the banking system. Herrmann deposition at 36; Stone deposition at 48. Loss of confidence in one of the United States' most fundamental institutions would certainly disserve public interest. By granting the preliminary injunction, the Court is serving the public interest; it is protecting the bank's depositors, creditors, as well as the public at large from the premature insolvency of one of its national banks.

After analysis of the four preceding factors, the Court finds that the United States of America has proved the requisite elements for a preliminary injunction.

V. CONCLUSION

Based upon the foregoing discussion, the Court finds that the United States of America's petition for declaratory and injunctive relief is well-taken. This Court finds that 12 U.S.C. § 91 precludes the execution of the state court judgment directed to Defendant MBank Abilene, N.A. until said Bank has exhausted its appellate remedies.

The Court also orders injunctive relief enjoining Defendants LeMaire, Patton, Scales, Zeissig and Scherfenberg's execution of the state court judgment and attachments or garnishments resulting in connection therewith.

An order will be entered in conformance with this memorandum opinion.

IT IS SO ORDERED.

SIGNED this 24 day of October, 1986.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA	)	
	)	CIVIL ACTION
VS.	)	NO. 1-86-143-K
MBANK ABILENE, N.A., HARRY LEMAIRE, RICHARD PATTON, HILMAR ZEISSIG, BERT SCALES and DIETER SCHERFENBERG	)	(Filed October 24, 1986)

PRELIMINARY INJUNCTION

For the reasons stated in the accompanying Memorandum Opinion of same date, the Court finds that the United States of America's petition for declaratory and injunctive relief should be GRANTED.

It is therefore ORDERED, ADJUDGED and DECREED that during the pendency of this Injunction, Defendants Harry LeMaire, Nan Patton, Hilmar Zeissig, Bert Scales and Dieter Scherfenberg, including their attorneys, are enjoined from further enforcing or further seeking to enforce any writs of attachment, writs of garnishment or executions upon a judgment sought, filed or entered in connection with the above-referenced state proceeding *LeMaire v. MBank Abilene, N.A.*, including attempts at enforcement by seeking to hold third parties or MBank Abilene in contempt of state court orders as long as this Injunction is in effect.

It is further ORDERED that MBank Abilene, N.A. shall cause a copy of its daily responsibility trial balance sheet to be delivered to the Court and to counsel for other Defendants by 5:00 o'clock P.M. of the same date such balance sheets are made available to MBank Abilene, N.A. Such documents filed with the Court shall be filed under seal and shall not be provided to any person or entity not a party to this action without order of this Court. The documents provided to counsel for the remaining Defendants shall be kept confidential, shall not be disclosed other than to parties or their attorneys in this cause and shall not be used for any purpose other than for use in this litigation.

IT IS SO ORDERED.

SIGNED this 24 day of October, 1986.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE